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No. 59534-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DOUG AND BETH O'NEILL,

Appellants,

vs.

CITY OF SHORELINE AND DEPUTY MAYOR MAGGIE FIMIA,

Respondents.

AMICUS BRIEF OF WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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I. IDENTIFICATION AND INTEREST OF AMICUS CURIAE

Amicus Washington State Association of Municipal Attorneys (WSAMA) is a not-for-profit corporation made up of attorneys who advise and represent most cities and towns in the State of Washington. WSAMA submits this brief in support of Respondents' Petition for Discretionary Review of a published decision from Division I of the Court of Appeals.

Washington has 281 cities and towns, ranging from Seattle with over a half million residents to cities with populations of less than 100. Every city and town in Washington is subject to the requirements of the Public Records Act (PRA), and many thousands of public disclosure requests are received by these cities and towns annually. For example, the City of Seattle alone received approximately 5400 public disclosure requests in 2007. City and town employees devote hundreds of hours and significant resources searching for records, both in hard copy and electronically, and producing those records. WSAMA is deeply concerned that the possible implications of Division I's broad statements regarding an agency's obligations to produce "metadata" associated with email will severely tax government resources without any real improvement to open government. WSAMA therefore respectfully voices its concerns on behalf of Washington's towns and cities, and urges this Court to grant discretionary review.

II. ISSUES DISCUSSED BY AMICUS

WSAMA files this brief to request that this Court accept review and address the following issues: (1) Whether metadata per se is a public record, even in the absence of a showing that it relates to the conduct of government; (2) Whether metadata that cannot be viewed or retrieved by a typical agency employee is an identifiable public record; and (3) Whether deleted electronic records constitute identifiable public records under the PRA.

III. STATEMENT OF THE CASE

WSAMA adopts the statement of the case contained in Respondents' City of Shoreline and Deputy Mayor Maggie Fimia's joint Petition for Discretionary Review.

IV. ARGUMENT

A. Review Is Warranted Of Division I's Conclusion That Metadata Per Se Is A Public Record, A Ruling Of Substantial Public Interest.

The overriding public policy of the Public Records Act (RCW Ch. 42.56) is to keep the public informed so that it may monitor the government's functioning. *Tacoma Public Library v. Woessner* 90 Wn.App. 205, 223, 951 P.2d 357, 366 (1998) citing former RCW 42.17.251 (recodified at RCW 42.56.030). In order to further that public

policy, the PRA requires public agencies to produce public records upon request, unless a specific exemption applies. RCW 42.56.080. The PRA defines a public record as "...any writing containing information *relating to the conduct of government or the performance of any governmental or proprietary function...*" RCW 42.56.010(2) (emphasis added). Thus, there must be a factual finding that a document relates to the conduct of government before it is deemed to be a public record. *Dragonslayer, Inc. v. Washington State Gambling Com'n*, 139 Wn.App. 433, 445, 161 P.3d 428 (2007).

The primary issue in *O'Neill*, and the purpose of the specific request for "metadata" in this case, was to determine who received and sent a specific email, and thus who may have had knowledge of alleged governmental improprieties. In fact, the identity of the senders and recipients of an email is the only information that Division I specifically concludes is "related to the conduct of government." *O'Neill v. City of Shoreline*, 145 Wn.App. 913, 925, 187 P.3d 822 (2008). But in its decision, without any analysis as to how it relates to a governmental function, Division I states more broadly that a requestor is entitled to "metadata" associated with an email upon request. *Id.* at 935. Nowhere does the decision explicitly analyze and define exactly what metadata is,

or what types of metadata relate to the conduct of government and thus constitute a pubic record.

Moreover, Division I goes even further and concludes that a copy of the same email received by different recipients may have different metadata that constitutes separate public records. *Id.* Taken to its logical conclusion, this portion of Division I's holding results in absurdities. For example, the City of Seattle frequently sends identical emails to its eleven thousand employees on a wide range of personnel issues such as the features of the City's Employee Assistance Program. If a PRA requester asked for "the City-wide Employee Assistance Program email including any metadata," under the *O'Neill* decision, the City might be obligated to produce *eleven thousand* individual emails -- each copy of the email received by every city employee -- because each of those eleven thousand emails contains unique, but entirely insignificant, metadata as it reaches each of the eleven thousand computers of city employees. If all metadata is a public record, the City would be compelled to individually collect each email from every individual City employee's computer to ensure all metadata is collected.

Ironically, the facts of *O'Neill* did not even require Division I to delve into metadata. Division I specifically holds only that the identity of the senders and recipients of email is information related to the conduct of

government. That information can be determined from a simple printout of the document. Consequently, Division I never had to address the question of whether any or all other metadata associated with the email in question was a writing related to the conduct of government and thus subject to the PRA.

Without further review of Division I's decision, the trial courts will be at a loss to implement its holding, and state and local agencies will founder in trying to comply with the decision in responding to future PRA requests that include metadata.

The request for review of Division I's decision becomes more compelling upon consideration of the fact that Division I's holding that metadata is a public record potentially applies to the full spectrum of electronic documents. As Division I recognized, the PRA "is a strongly worded mandate for broad disclosure of public records." *Id.* at 922. Without additional guidance, agencies state-wide could be required to retrieve and disclose all types of irrelevant metadata for every conceivable type of electronic file format, including Word documents, Excel spread sheets, Access and other database documents, video, audio, and photo files.[1] In other words, agencies would face a staggering burden in having

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[1] *The Sedona Principles Addressing Electronic Document Production, Comment 12.b*

to disclose electronic data having nothing to do with the conduct of government.

B. Review Is Warranted Of Division I's Assumption That Metadata That Cannot Be Viewed Or Retrieved By The Typical Agency Employee Is An Identifiable Record, A Ruling Of Substantial Public Interest.

The PRA only obligates agencies to produce "identifiable public records" in response to public disclosure requests. RCW 42.56.080. The PRA "does not provide a right to citizens to indiscriminately sift through an agency's files in search of records or information which cannot be reasonably identified or described to the agency." *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604, 963 P.2d 869, (1998). *See also Sperr v. City of Spokane*, 123 Wn.App. 132, 136-137, 96 P.3d 1012 (2004). Moreover, an agency is not required to create a record that is otherwise non-existent. *Smith v. Okanogan County* 100 Wn.App. 7, 14, 994 P.2d 857 (2000).

Without any analysis, Division I assumes that metadata per se is an identifiable record that an agency must produce upon request. But in the context of electronic discovery, the Federal Courts have recognized that while some metadata, such as file dates and sizes, can easily be seen by users; other metadata is hidden or embedded and unavailable to computer users who are not *technically adept*. *Williams v. Sprint/United Management Co.* 230 F.R.D. 640, 646 (D.Kan. 2005)(emphasis added).

Metadata is also created and stored in a myriad of different forms, and contains a substantial amount of "non-apparent" data, which cannot be seen by the average user.[2] If a typical agency employee cannot see or identify this hidden or embedded metadata, then it cannot be an identifiable record for the purposes of the PRA.

C. Review is Warranted Of Division I's Assumption That Deleted Metadata Is A Public Record, A Ruling Of Substantial Public Interest.

Moreover, Division I also imposes an unprecedented obligation on agencies to conduct advanced computer forensics searches, and potentially purchase and utilize specialized software, to pursue and reassemble metadata associated with an email that may have been deleted. *O'Neill*, at 935-936. But conducting such a search is far beyond the capability of a typical agency employee, and likely many agencies. In addition, it constitutes records creation, which the PRA does not require.

For example, in the context of electronic discovery, the Federal courts have recognized that when deleted, electronic files are broken up and the fragments are randomly placed throughout a computer. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 319 (S.D.N.Y. 2003). The fragmented files can only be accessed and pieced back together after

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[2] *The Sedona Principles Addressing Electronic Document Production, Comment 12.b, supra*

significant processing by an Information Technology specialist. *Id.* Because this erased, fragmented data must be reconstructed before it is potentially usable, deleted files are deemed "inaccessible" in the field of electronic discovery. *Id.* at 320. If the Federal courts have deemed deleted files inaccessible in the context of electronic discovery, it defies logic to consider these files "identifiable" in the context of the PRA.

Imposing such burdens on agencies to search for metadata relating to deleted records contradicts the PRA, case law, and the explicit guidance that the Attorney General has provided to agencies in the Public Records Act Model Rules.

At the direction of the legislature, the Attorney General adopted the Model Rules three years ago after an extensive outreach project involving public forums across the state and the solicitation of written comments from both agencies and requestors. WAC 44-14-00001. The purpose of the Model Rules, which are contained in the Washington Administrative Code, is to assist agencies in responding to public disclosure requests, and in determining what constitutes an identifiable record in today's electronic age.

According to the Model Rules and existing case law, an identifiable electronic record is essentially one that agency staff can "reasonably locate." WAC 44-14-04002(2) (citing *Bonamy v. City of*

Seattle, 92 Wn. App. 403, 410, 960 P.2d 447 (1998)). The PRA Model Rules provide examples of what constitutes a reasonable search for electronic records, such as using a common word search for emails, or a common organizing feature of email programs such as a chronological "sent" folder. WAC 44-14-05002(1). Significantly, the Model Rules do not require searches for electronic records that involve any more expertise than a common knowledge of typical email software; a typical agency employee should have the requisite skills to search for identifiable electronic documents.

Nothing in the Public Records Act obligates an agency to engage an Information Technology specialist and purchase specialized software in order to search for and process erased data into a usable format and thereby create records in response to a public disclosure request. Yet the City of Shoreline went beyond the requirements of the PRA and sent its Information Technology specialist to search the home computer of Deputy Mayor Fimia in a futile search for deleted metadata. But Division I demanded even more – beyond the requirements of the PRA – and suggested that the City must purchase special software to see if deleted metadata possibly still exists. Division I's decision disregards the limits of the PRA and the common sense approach of the Attorney General's Model Rules in applying the law to the developing world of electronic

records. Without review, Division I's holding means that agencies will be obligated to employ Information Technology specialists and purchase unique software for what are presently the most straightforward responses to simple public records requests.

V. CONCLUSION

For the aforementioned reasons, Amicus Washington State Association of Municipal Attorneys respectfully urges the Court to accept review of Division I's published decision in *O'Neill v. City of Shoreline*, 145 Wn.App. 913, 187 P.3d 822 (2008).

DATED this 23rd day of December, 2008.

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CERTIFICATE OF SERVICE

I, Gary T. Smith, certify that on this date I caused a copy of Amicus Brief of Washington State Association of Municipal Attorneys to be filed with the court and served by email and United States Postal Service regular mail on:

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Signed at Seattle, Washington, this 23rd day of December, 2008.

Gary Smith

OFFICE RECEPTIONIST, CLERK

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Rec'd 12/23/08

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CITY OF SHORELINE, a Washington municipal corporation, and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity, Appellants,

v.

DOUG AND BETH O'NEILL, individuals,
Respondents.

No. 82397-9

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Dear Clerk of the Supreme Court,

Attached please find (1) Washington State Association of Municipal Attorneys Motion for Leave to Appear as Amicus Curiae; and (2) Amicus Brief of WSAMA.

Thank you,

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